In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 240

THE SECOND NATIONAL BANK OF NEW-HAVEN, EXECUTOR OF THE WILL OF FREDERICK F. BREWSTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

This case involves the effect to be given in a federal estate tax suit to a State trial court decree determining the character of an interest in property held or transmitted by a decedent at his death. Because there is a conflict among the circuits on this important and recurring question, we acquiesce in the petition for a writ of certiorari insofar as it is addressed to this issue.

Decedent's will and codicil provided, in part, that one-third of his residuary estate was to be held in

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trust for his widow, who was to receive the income from this trust during her life and was given a general testamentary power of appointment over the corpus. Decedent left the other two-thirds of his residuary estate in trust for his grandchildren. (R. 19a, 28a.[1])

The widow's trust clearly qualified for the estate tax marital deduction; the only question was the amount of the deduction. If, under Connecticut law, the federal estate tax was to be paid out of the residue of decedent's estate, the widow's trust would be approximately $1,700,000 (1/3 of the residue *after* payment of taxes) and only this amount would qualify for the estate tax marital deduction. See Int. Rev. Code of 1954, § 2056(b)(4)(A). If, on the other hand, under Connecticut law, the federal estate tax was to be paid only out of the grandchildren's two-thirds share of the residue, the widow's trust would be approximately $3,600,000 (1/3 of the residue *before* reduction for taxes) and this larger amount would qualify for the estate tax marital deduction. (R. 69a, 88a–89a; Pet 9a.)

If Connecticut's proration statute (Pet. 7a–8a, fn. 2) applies in this case the entire federal estate tax liability would be paid out of the grandchildren's share of the residue.[2] The proration statute is ap-

[1] "R" references are to the printed record in this case set forth in Appendix B to the government's brief in the court of appeals.

[2] Under the proration statute no tax is payable out of an interest which is deductible for federal estate tax purposes; therefore no tax would be payable out of the widow's trust since it qualified for the marital deduction (Pet. 9a).

plicable unless the decedent's will otherwise provides. Decedent's will directs his executors "to pay" "death taxes" "out of my estate" and further states that "The provisions of any statute requiring the apportionment or proration of such taxes among the beneficiaries of this will * * * shall be without effect" (R. 14a).

On decedent's estate tax return petitioner (decedent's executor) claimed a marital deduction of $3,600,000. The Commissioner took the position that decedent's will had negatived application of the proration statute and therefore the allowable marital deduction was only $1,700,000.

After receipt of the 30-day letter stating the Commissioner's position, petitioner filed an application in the Connecticut probate court seeking a determination that it was proper to allocate the entire tax liability to the grandchildren's trust (R. 31a–42a, 89a). Notice of hearing on this application was given to the widow, to the District Director of Internal Revenue (who did not appear), to beneficiaries of the grandchildren's trust who had come of age, and to a guardian *ad litem* representing the minor grandchildren (R. 38a–39a, 78a–79a, 80a, 89a). The guardian *ad litem*, an attorney, filed a memorandum stating that if the tax were to be allocated under the proration statute, the trusts created for his wards would bear "substantially the entire tax" (R. 76a). Nevertheless, he stated that he had "no objection to the granting of the Executors' Application for the Proration of the Federal Estate Tax" (R. 76a-78a). So far as the record shows, no one opposed the executor's applica-

tion. After a hearing at which only the guardian *ad litem* and the executor's attorneys were present, the Probate Court filed a memorandum of decision which, without mentioning the above-quoted language in the decedent's will, followed the only position asserted by the parties and held that the proration statute applied, on the ground that the decedent's will did not unambiguously direct otherwise (R. 80a–81a).

Petitioner paid a deficiency of $1,333,194 plus interest, brought suit for a refund, and moved for summary judgment (R. 12a, 48a, 51a, 89a, 90a). The federal district court held that it was not conclusively bound by the Connecticut Probate Court's determination but granted summary judgment for petitioner on the ground that the decedent's will had not negatived application of the proration statute (R. 96a–110a). The court of appeals agreed that the district court was not conclusively bound by the Probate Court decree, but it reversed the district court's judgment on the ground that the decedent's will "would seem to be clear and unambiguous to the effect that taxes were to come out of his residual estate and that despite any contrary statute the testator specifically wished to avoid any proration" (Pet. 6a). The court of appeals held that the probate decree was not binding in the federal tax case without regard to whether

the probate proceedings had been "collusive or non-adversary in nature" (Pet. 13a). The court of appeals denied a petition for rehearing and rehearing *en banc* (Pet. 2).

The petition for a writ of certiorari presents two questions:

(1) Whether under Connecticut law the estate tax should be paid (as petitioner contends) entirely out of the grandchildren's trust or (as the court of appeals held) out of the entire residue of decedent's estate including the one third of the assets bequeathed to the widow's trust.

(2) Whether the federal courts were conclusively bound in this federal estate tax controversy by the Connecticut Probate Court's decree.

For the reasons stated below we oppose certiorari as to question (1) and acquiesce as to question (2).

1. The Connecticut proration statute does not apply "when a testator otherwise directs in his will" (Conn. Gen. Stat. § 12–401; Pet. 7a–8a, fn. 2). After careful analysis of the language of the will and codicil here involved, the court of appeals concluded that the language was "clear and unambiguous to the effect that taxes were to come out of his residual estate and that * * * the testator specifically wished to avoid any

proration" (Pet. 6a).[3] This conclusion is correct, but, even if it were not, interpretation of the particular language used in decedent's will presents solely an issue of State law and no issue of general importance warranting review by this Court.

2. The second issue presented by the petition for certiorari is the effect to be accorded the State Pro-

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[3] The Court stated that (Pet. 9a–10a, 12a):

"It would be difficult to conceive of a clearer direction expressing the thought that death taxes, together with debts and funeral expenses, were to be paid out of the estate. The first sentence of Article One ('I direct my executors to pay out [of my estate] my just debts and funeral expenses and any death taxes * * *') has been held in cases where similar language was construed not only to shift the tax burden to the residue as an expense of administration, *Starr* vs. *Watrous*, 116 Conn. 448, 165 Atl. 459 (1933), but also as the equivalent of a direction against proration among the residuary legatees. *Crump* vs. *Crump*, 20 Conn. Supp. 471, 140 A. 2d 143 (Super. Ct. 1957). The 'inclusion of them [taxes] in the same classification as debts, funeral expenses * * *' is an expression of 'an intention that they should be paid out of the estate in the same way and from the same funds as those other charges.' *Starr* v. *Watrous*, *supra*, 116 Conn. at [453], 165 Atl. at 460.

"Any far-fetched doubt as to the testator's intent in the first sentence of paragraph 'One' is quickly dispelled by the sentence in which he specifically declares that 'The provisions of any statute requiring the apportionment or proration of such taxes among the beneficiaries * * * shall be without effect in the settlement of my estate.'

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* * * The codicil shows a desire to qualify one-third of the residue as a marital deduction. It does not disclose an intention to have this part of the residue in effect tax free and grossly disproportionate to the other two-thirds. That which the testator did not choose to do during his lifetime the courts should not do after his death."

bate Court decree in the instant federal estate tax litigation. The court below concluded that the State court's decision was not "binding and conclusive upon a federal court in construing and applying the federal revenue laws" (Pet. 13a).

We believe that the court below reached the correct result, and disagree with the petitioner's assertion (Pet. 16–17) that it conflicts with decisions of this Court. However, we agree that the instant result cannot fairly be reconciled with either the decisions of the Third Circuit attributing binding effect to a State trial court decree for estate tax purposes[4] or with a subsequent split decision by an entirely different panel of the Second Circuit. *Commissioner* v. *Estate of Herman J. Bosch*, decided July 6, 1966 (C.A. 2), in which the government is contemporaneously filing a petition for certiorari. The existence of this direct conflict between the courts of appeals is discussed in our petition for a writ of certiorari in the *Bosch* case (a copy of which is being served on the petitioner in this case).

Although we believe that the result reached by the court below in the instant case is correct, we agree that the petition for a writ of certiorari should be granted upon this issue, because of the direct conflict

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[4] *Babcock's Estate* v. *Commissioner*, 234 F. 2d 837, 841–842 (C.A. 3); *Beecher* v. *United States*, 280 F. 2d 202, 203–204 (C.A. 3); *Darlington's Estate* v. *Commissioner*, 302 F. 2d 693, 694 (C.A. 3); see also *Gallagher* v. *Smith*, 223 F. 2d 218, 222–223 (C.A. 3).

between the circuits and the important and recurring nature of the problem.

Respectfully submitted,

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*In lieu of the Solicitor General, who has disqualified himself.

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